SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

FERRER, POIROT & WANSBROUGH AND
STEVEN MESTEMACHER,

Petitioners

V.

BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did Bombardier substantively state a claim for equitable relief, against Mestemacher and Ferrer, thereby conferring subject matter jurisdiction upon the district court?

2. Is Mestemacher, or Ferrer, entitled to obtain an equitable offset, from Bombardier, for Bombardier's equitable share of the attorney's fees and expenses incurred, by Mestemacher or Ferrer, in securing a recovery for medical expenses paid by Bombardier, from the proceeds of a third party settlement, under the common fund doctrine?

LIST OF PARTIES

The caption of the case contains the names of all parties to this proceeding. However, the following listed persons and entities also have an interest in the outcome of this case:

1. Bombardier Aerospace Employee Welfare Benefits Plan - related entities:

   a. Bombardier Aerospace
   b. Bombardier Transportation
   c. Bombardier Recreational Products
   d. Bombardier Capital
   e. Bombardier International

2. Great-West Life & Annuity Insurance Company - paid benefits on behalf of Bombardier

3. Health Care Recoveries, Inc. - agent for Respondent and Great-West

4. Bank of America, N.A. - bank where Ferrer's trust account, including the subject funds, were kept

5. Elaine L. Chao, Secretary of the United States Department of Labor – Amici below

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTORY PROVISION INVOLVED.....2

STATEMENT OF FACTS.....3

REASONS FOR GRANTING THE PETITION..... 6

This Court should resolve the conflicts among the lower courts.

Question 1.....7

Question 2.....10

CONCLUSION.....14

APPENDICES

A. Fifth Circuit's opinion, reported at *Bombardier Aero. Empl. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 2003 U.S. App. LEXIS 25428 (5th Cir. Tex. Dec. 17, 2003).....1a

Page

B. District Court's Memorandum Opinion, reported at *Bombardier Aero. Empl. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C., 2003,* U.S. Dist. LEXIS 1643 (N.D., Tex., Feb. 4, 2003).....33a

C. Fifth Circuit's order denying rehearing en banc, on January 13, 2004.....42a

TABLE OF AUTHORITIES

Statutes **Page**

19 U.S.C. § 1002(1).....4

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1331.....2

29 U.S.C. § 502(a)(3).....3

29 U.S.C. § 1132 (a)(3).....2, 3, 7

Cases

Administrative Comm. Of Wal-Mart Stores, Inc. v. Varco,
338 F.3d 680 (7th Cir. 2003).....6, 7, 11, 12, 13, 14

Bauhaus USA, Inc. v. Copeland,
292 F.3d 439 (5th Cir. 2002).....7, 8, 12

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980).....13

*Bombardier Aero. Empl. Welfare Benefits Plan v.
Ferrer, Poirot & Wansbrough*, et al,
2003 U.S. App. LEXIS 25428
(5th Cir. Tex. Dec. 17, 2003).....10, 11, 13

Bowen v. Massachusetts,
487 U.S. 879 (1988).....8

Page

Carpenter v. Modern Drop Forge Co.,
919 F. Supp. 1198 (N.D. Ind. 1995).. 12

Central Railroad & Banking Co. v. Pettus,
113 U.S. 116 (1885).....11

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002).....3, 6, 7, 8, 9, 12

Hall v. Cole,
412 U.S. 1 (1973).....11

Knebel v. Capital Nat'l Bank In Austin,
518 S.W.2d 795 (Tex. 1974).....14

Lancer Corp. v. Murillo,
909 S.W.2d 122 (Tex. App. – San Antonio 1995, no writ)...13

Mertens v. Hewitt Assocs.,
508 U.S. 255 (1993) 8

Mills v. Electric Auto-Lite Co.,
396 U.S. 375 (1970).....11

Primax Recoveries, Inc. v. Sevilla,
324 F.3d 544 (7th Cir. 2003).....7, 12

Sholtens v. Schneider,
173 Ill.2d 375 (1996).....12

Sprague v. Ticonic National Bank,
307 U.S. 161 (1939).....11

Page

Trustees v. Greenough,
105 U.S. 527 (1881).....11

United McGill Corp. v. Stinnett,
950 F. Supp. 134 (D. Md. 1996) 12

Westaff (USA) Inc. v. Arce,
298 F.3d 1164 (9th Cir. 2002); *cert denied*,
537 U.S. 1111 (2003).....6, 8, 9

Federal Rules of Civil Procedure

Fed. R. Civ. P. 12(b)(1).....3

Fed. R. Civ. P. 12(b)(6).....3

Treatises

Black on Rescission and Cancellation,
vol. 2, p. 1414, § 616 et seq. 10, 13

Dawson, John P., *Lawyers and Involuntary Clients: Attorney Fees from Funds*,
87 Harv. L. Rev. 1597 (1974) 11

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FERRER, POIROT & WANSBROUGH AND
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V.

BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

For compelling reasons shown, Ferrer, Poirot & Wansbrough, and Steven Mestemacher, Petitioners, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 17, 2003.

OPINIONS BELOW

The relevant opinions and orders, necessary for determination of this Petition, are reprinted herein, and attached to the appendices, as follows:

1. Fifth Circuit's opinion, reported at *Bombardier Aero. Empl. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 2003 U.S. App. LEXIS 25428 (5th Cir. Tex. Dec. 17, 2003) - App. A, pp. 1a;

2. District Court's Memorandum Opinion, reported at *Bombardier Aero. Empl. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C.*, 2003, U.S. Dist. LEXIS 1643 (N.D., Tex., February 4, 2003) - App. B, pp. 33a; and

3. Fifth Circuit's order denying rehearing on January 13, 2004 - App. C, pp. 42a.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Fifth Circuit entered judgment on December 17, 2003 and entered an order denying Petitioner's motion for rehearing en banc on January 13, 2004. This Court has jurisdiction, per 28 U.S.C. § 1254(1), to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

Employee Retirement Income Security Act of 1974 (ERISA)
29 U.S.C. § 1132 (a)(3)

"(a) Persons empowered to bring a civil action

A civil action may be brought--
...(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;"

Although ERISA is silent as to the plan's reimbursement/ subrogation rights, ERISA authorizes plan administrators to bring suit in federal court only to obtain "appropriate equitable relief" to "enforce the terms of the plan." 29 U.S.C. § 1132 (a)(3); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

STATEMENT OF FACTS

Bombardier seeks enforcement of the terms of an employee benefit plan established under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (a)(3); 29 U.S.C. § 502(a)(3) ("ERISA"). (R-I, 1-8).[1] Petitioners allege, inter alia, that ERISA does not authorize the "legal" relief sought against them, and therefore, the district court lacked subject matter jurisdiction. *Fed. R. Civ. P.* 12(b)(1)(6). (R-I, 31-36; 37-43; 51-56; 68-72).

The district court entered final judgment, on February 12, 2003, holding that: (1) Bombardier stated a claim for

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[1] References to the Record on Appeal are designated by "R," the number of the record volume assigned by the Clerk of the district court, followed by page number(s). References to the Record Excerpts are designated "RE" followed by the relevant tab number(s).

equitable relief and that the court, therefore, had subject matter jurisdiction; and (2) Bombardier was entitled to reimbursement, totaling $13,643.63, without any offset for attorney's fees and expenses, under the common fund doctrine. (R-II, 283).

Appellants perfected an appeal to the United States Court of Appeals for the Fifth Circuit. (R, II – 285). Thereafter, the court issued its panel opinion, and judgment, on December 17, 2003, affirming the district court's decision.

Bombardier is a "self-funded employee welfare benefit plan" within the meaning of Section 3(1), of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 19 U.S.C. § 1002(1). (R-I, 1, 31, 51).

On or about January 31, 2002, Mestemacher was injured in an automobile collision and received medical treatment resulting therefrom. (R-I, 3, 52). Bombardier, or its agents, paid, on Mestemacher's behalf, medical bills, for treatment he received in connection with that collision, totaling $13,643.63. Mestemacher settled his claim against the negligent tortfeasor for $65,000.00. (R 3, 4, 32, 33, 52, 53).

Bombardier's subrogation/reimbursement clause states:

> "If YOU...recover money for medical...expenses incurred due to...injury for which a Benefit has been paid under this Plan, WE will have the right to *a refund from YOU...*" (Emphasis added) (R-I, 3, 33, 53).

Bombardier alleged, inter alia, in its Verified Complaint, that:

> "15. In spite of the Plan's *contractual rights*, Defendants have failed and refused to acknowledge *MESTEMACHER'S reimbursement obligation imposed under the terms of the plan..."* (Emphasis added) (R-I, 4); and
>
> "18. Because the Plan paid Mestemacher's medical expenses, and has an absolute *right of reimbursement* for those payments, ...the Plan is entitled to...an *order directing MESTEMACHER to pay...* such settlement funds to the Plan to the extent of the Plan's interest therein..." (Emphasis added) (R-I, 5).

Bombardier, thus, alleges that it is entitled to contractual reimbursement, from Mestemacher, to the extent of the $13,643.63 in benefits provided, on his behalf.

Bombardier, initially, sought a temporary restraining order requiring Ferrer to hold the disputed amount, in its trust account, pending final resolution of this claim. (R-I, 21-25). Ferrer and Mestemacher denied that Bombardier was entitled to its relief sought. (R-I, 33, 34, 53, 55). Nevertheless, to dispense with the necessity for a ruling on injunctive relief, sought by Bombardier, Ferrer agreed, without waiver, to temporarily hold $18,500.00, in Ferrer's trust account, pending further order or agreement. (R-I, 27, 28, 151). Mestemacher was not a party to that agreement, as he had not been served or made an appearance. (R-I, 27).

Ferrer performed all of the legal services, resulting in Mestemacher's recovery, in the underlying tort claim. (R-II, 152, 153). Of the $65,000 settlement obtained by Mestemacher, 33 1/3 %, or $21,666.66, was deducted from

Mestemacher's recovery, for attorney's fees, and $302.24 was deducted for non-medical expenses. (R-II, 152). A 33 1/3% contingency fee was reasonable, customary and necessary, considering the facts and complexity of the case, the issues and skills involved and the amount of time and effort required. (R-II, 152, 153). None of the attorney's fees or expenses were shared by Bombardier, or its agents, nor did Bombardier actively participate in the procurement of the settlement. (R-II, 152, 153).

If allowed to recover all of the $13,643.63, Bombardier will obtain a tremendous benefit, and be unjustly enriched, without the burden or expense of hiring an attorney to recover its interest. (R-II, 152). Therefore, if Bombardier is entitled to equitable relief, Ferrer and Mestemacher, affirmatively, seek an offset or reduction, of Bombardier's alleged interest, for a pro-rata share of the attorney's fees and expenses, under the equitable "common fund" doctrine. (R 30, 36, 153).

REASONS FOR GRANTING THE PETITION

On Question 1 presented for review, the Fifth Circuit panel decision conflicts with the decision of this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and the decision of the United States Court of Appeals for the Ninth Circuit in *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002); *cert denied*, 537 U.S. 1111 (2003), both of which denied relief to the ERISA plan under similar facts and equitable principles presented here.

On Question 2 presented for review, the Fifth Circuit's decision conflicts with the decisions of the United States Court of Appeals for the Seventh Circuit in *Administrative*

Comm. Of Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680 (7th Cir. 2003) (including *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. 2003)). Question 2, which affects the rights of ERISA plan administrators, beneficiaries and their attorneys, however, has not been, but should be, settled by this Court.

Question 1

In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and shortly thereafter, *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002), the ERISA plans paid the beneficiaries' medical expenses for treatment received resulting from a car wreck. The beneficiaries received a settlement from the third party tortfeasor, and the funds were placed, in *Knudson*, into a special needs trust,[2] and, *in Bauhaus*, into the registry of the court.[3] The Plan, or its insurers, sought to enforce the ERISA plan's reimbursement provision under 29 U.S.C.S. § 1132 (a)(3).

Although both *Knudson* and *Bauhaus* noted that the subject funds were not in the possession of the beneficiary, this fact was not dispositive on the question of whether the plan or its insurers substantively sought "appropriate equitable relief."

Both *Knudson* and *Bauhaus* held that the Plan's, or their insurer's, suits were not authorized, under § 1132(a)(3), because the relief they sought was not equitable in nature.[4] Rather, it was a claim for money damages:

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[2] *Knudson*, at 207.
[3] *Bauhaus*, at 441.
[4] *Knudson*, at 214; *Bauhaus*, at 445.

> "Almost invariably...suits seeking (whether by judgment, injunction, or declaration) to *compel the defendant to pay a sum of money* to the plaintiff are *suits for "money damages,"* as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty. *Bowen v. Massachusetts,* 487 U.S. 879, 918-919 (1988). (Scalia, J., dissenting). And "[m]oney damages are, of course, the classic form of *legal* relief." (Emphasis added) *Knudson* at 210; *Mertens v. Hewitt Assocs.*, 508 U.S. 255 (1993).

> "The basis for petitioners' claim is...that petitioners are contractually entitled to *some* funds for benefits that they conferred...[A] claim for money due and owing under a contract...is quintessentially an *action at law*...The kind of restitution that petitioners seek, therefore, is *not equitable* – ...but legal – *the imposition of personal liability for the benefits that they conferred upon respondents*." (Emphasis added) *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002).

In *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002); *cert denied*, 537 U.S. 1111 (2003), however, Arce, an ERISA plan beneficiary, placed a $15,000 third party tortfeasor settlement check, payable to Arce and Westaff, into an escrow account pending a determination of to whom the money was owed. Westaff, the ERISA plan, then sued Arce seeking a declaratory judgment, and specific performance, of the reimbursement provision of the plan.

Westaff argued that the funds in escrow belonged to it and sought to enforce Arce's obligation to reimburse them. *Westaff,* at 1166.

Holding that Westaff failed to state a proper claim for relief, that subject matter jurisdiction was, therefore, lacking, and affirming the district court's dismissal of the Plan's claims, the Ninth Circuit stated that:

> "This case differs from our prior cases only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been placed in an *escrow account* and remains *specifically identifiable*. The *action remains one for money damages*. The district court correctly recognized this and dismissed the case for failure to state a claim." (Emphasis added). *Westaff,* at 1167.

> "The Supreme Court has recently affirmed our approach in [*Knudson*], in which the Court analyzed a similar action to enforce a reimbursement clause by looking past the parties' chosen labels to the substance of the relief sought." *Westaff,* at 1166.

Here, very similar to *Westaff*, Mestemacher's settlement proceeds were placed in his attorney's (Ferrer's) trust account and were "specifically identifiable." The Fifth Circuit, however, holding that the subject funds were in Mestemacher's constructive possession, and ignoring Bombardier's admission, under oath, that if the funds are in Mestemacher's possession, Bombardier is not entitled to any

relief,[5] found that Bombardier stated a claim for "appropriate equitable relief."[6]

The Fifth Circuit has, admittedly, parted with the Ninth Circuit,[7] choosing, instead, to focus on the so-called "possession test" rather than the "substance of the remedy sought" by Bombardier. Thus, the Fifth Circuit's decision fatally conflicts with this Court's precedent and the Ninth Circuit. Petition for certiorari, therefore, should be granted to resolve the conflict in the circuits and ensure consistent application ("national uniformity")[8] of the equitable principles involved and of this Court's precedent.

Question 2

Premised upon an equitable principle, as old as the law itself, "He who seeks equity, must do equity,"[9] Ferrer and Mestemacher seek an equitable offset, for attorney's fees and expenses, from Bombardier's recovery, under the common fund doctrine.

If Bombardier seeks, or is entitled to, equitable relief, such relief must not unjustly enrich Bombardier. *Black, Id.* Equity requires the court to look beyond the plan language.

The issue, then, is not whether, under the "clear language of the plan," Mestemacher is required to pay his own attorney's fees, but whether Bombardier, if allowed *equitable* relief, presumably to prevent Mestemacher's

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[5] (R-1, 5, 6, 19, 20; See, also, R-1, 22, 23)
[6] *Bombardier,* at 27.
[7] *Bombardier,* at 27, fn. 43.
[8] *Bombardier,* at 22.
[9] *Black on Rescission and Cancellation*, Vol. 2, p. 1414, §616, et seq.

unjust enrichment, will, itself, be unjustly enriched by not having to share in the cost and expense of recovering its claimed interest in Mestemacher's third party personal injury settlement proceeds.

The Fifth Circuit panel opinion, misapplying and misinterpreting *Varco*,[10] held that the district court correctly refused to apply either the Texas or federal common fund doctrines to allow a deduction, from the Plan's recovery, of a pro rata share of Mestemacher's attorney's fees and expenses. *Bombardier,* at 29.

The "common fund" doctrine, pre-dating ERISA and any contract between Bombardier and Mestemacher, originated in *Trustees v. Greenough*, 105 U.S. 527 (1881); Dawson, John P., *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv. L. Rev. 1597, 1601 (1974). In *Greenough*, this Court held that a prevailing plaintiff, who had created a common fund, benefiting other parties as well as himself, could recover his reasonable costs of the litigation, including attorney fees. *Greenough*, at 532-37.[11]

The common fund doctrine is based on the equitable principle that those receiving the benefits of the suit should bear their fair share of the expenses. The attorney fees are allowed as a charge against the fund. *Greenough*, at 532-537.

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[10] *Administrative Comm. Of Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680 (7th Cir. 2003).

[11] See, also, *Central Railroad & Banking Co. v. Pettus,* 113 U. S. 116 (1885); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); cf. *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Prior to *Knudson* and *Bauhaus*, courts recognized that "had the employee not engaged an attorney and pursued his case, the ERISA plan would not have recovered any of the benefits paid." *United McGill Corp. v. Stinnett*, 950 F. Supp. 134, 137 (D. Md. 1996); *Carpenter v. Modern Drop Forge Co.*, 919 F. sup. 1198, 1206 (N.D. Ind. 1995). It was only "fair," "appropriate" and "*equitable*" for the plan to pay its fair share for the employee's recovery, on the plan's behalf, and reduce such recovery by one third for attorney's fees plus a proportionate amount of the expenses. (Emphasis added) *United* at 137; *Carpenter* at 1206.

The Fifth Circuit's reliance upon *Varco*, in denying Ferrer a common fund offset against Bombardier's recovery, is misplaced and contradictory to the Seventh Circuit's decision.

Although the Court in *Varco*, denied common fund relief to the *beneficiary*, it specifically stated that the beneficiary's *attorney*, *under Illinois law*, is the one that owns the claim to a common fund offset:

> "[I]t is not readily apparent that *Varco* has standing to raise the claim for attorney's fees under the Illinois common fund doctrine. In *Bishop*, the Illinois Supreme Court noted that the right of the common fund doctrine is a "quasi-contractual right to payment of fees for services rendered, [and] *belongs to the attorney who rendered the services, and does not affect the contractual relationship between the plan participant and the plan.*" *Bishop* at 31 (citing *Scholtens v. Schneider*, 173 Ill. 2d 375, 671, N.E. 2d. 657, 21 Dec. 490 (1996)); *Primax*, 324 F.3d at 547.

> *Common fund claims are, therefore, considered "wholly independent of a benefit plan under Illinois law, and [are] to be brought by a third party, the attorney who represented the participant, to enforce the attorney's quasi-contractual right to payment for services rendered in recovering [for the plan's benefit].*" (Citations omitted)...*Varco's attorney, Dunford, has been dismissed from this action* and all of the disputed funds remain in Varco's sole possession in a reserve account in her name...However, *as Illinois courts have held, the common fund doctrine operates independently of a plan document. Because Dunford has no stake in the outcome* of this case, this *action by Varco* is not for appropriate equitable relief pursuant to the Illinois common fund doctrine." (Emphasis added) *Varco* at 690-691.

Varco clearly preserves to Ferrer a right of common fund offset against Bombardier's recovery and, thus, supports Ferrer's claim for relief. As to Ferrer, the Fifth Circuit misplaces its reliance upon *Varco*. However, the Fifth Circuit's use of *Varco*, to defeat Mestemacher's claim for common fund offset, ignores established equitable principles, this Court's precedents, and Texas law,[12] which would preserve Mestemacher's claim, as well.

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[12] *Black on Rescission and Cancellation*, vol. 2, p. 1414, § 616 et seq. The Fifth Circuit stated here that, "There is no substantive difference between the Texas and federal versions of this doctrine; in essence, both provide that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 47, 478 (1980); compare *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. App. — San Antonio 1995, no writ) ("Under the [Texas] common fund doctrine, the court may allow reasonable

Ferrer and Mestemacher conclusively established their common fund claims, as a matter of law. The Fifth Circuit's erroneous reliance upon, and misinterpretation of, *Varco*, thus, creates a conflict between the Fifth and Seventh Circuits. Accordingly, this Court should review this case to resolve the conflict.

CONCLUSION

Currently, ERISA plan administrators, in the Ninth Circuit, do not have a remedy to enforce a plan's subrogation clause, but in the Fifth Circuit, they do. In the Seventh Circuit, beneficiaries' attorneys can obtain a common fund offset, for attorney's fees and expenses, from the proceeds of an ERISA plan's subrogation claim; however, in the Fifth Circuit, they cannot.

This proceeding involves two questions of exceptional, national importance, governing administration of ERISA plans, on which the Fifth Circuit panel decision conflicts with the authoritative decisions of this Court and other United States Courts of Appeals that have addressed these issues. The precise factual situation presented here arises hundreds of times, daily, throughout the United States, in the ordinary course of personal injury law practice. Review by this Court, is, therefore, necessary to:

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attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefiting other parties as well as himself.")(cites omitted). (Emphasis added). *Bombardier*, at 35, fn. 52, 53. See, also, *Knebel v. Capital Nat'l Bank In Austin*, 518 S.W.2d 795 (Tex. 1974).

1. resolve the conflicts between the Ninth and Fifth Circuits, on Queston 1, and the Fifth and Seventh Circuits, on Question 2; and

2. secure and maintain, for ERISA plans, their beneficiaries and attorneys, national uniformity of the equitable principles involved and of this Court's decisions.

WHEREFORE, Petitioners respectfully pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

Appendix A

REVISED JANUARY 5, 2004
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10195
[Filed December 17, 2003]

BOMBARDIER AEROSPACE EMPLOYEE
WELFARE BENEFITS PLAN,

Plaintiff - Appellee,

Versus

FERRER, POIROT AND WANSBROUGH; ET ALS,

Defendants,

FERRER, POIROT AND WANSBROUGH;
STEVEN MESTEMACHER,

Defendants - Appellants.

Appeal from the United States District Court for the
Northern District of Texas, Dallas Division

Before JOLLY and WIENER, Circuit Judges and

WALTER,* District Judge.

WIENER, Circuit Judge:

Defendants-Appellants Ferrer, Poirot & Wansbrough, P.C. (the "law firm") and Steven Mestemacher appeal the district court's grant of the summary judgment motion of Plaintiff Appellee Bombardier Aerospace Employee Welfare Benefits Plan (the "Plan"), an ERISA-governed, self-funded employee welfare benefit plan, to enforce the terms of the Plan's reimbursement provision against the law firm and Mestemacher. They also appeal the district court's denial of their respective motions to dismiss the Plan's action for lack of subject matter jurisdiction and for failure to state a claim, as well as its denial of their joint motion for summary judgment. We affirm.

I. FACTS AND PROCEEDINGS

A. Background

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* District Judge for the Western District of Louisiana, sitting by designation.

The Plan was established by Bombardier Aerospace to provide managed care services for its employees and their dependents.[1] Mestemacher was an employee of Bombardier Aerospace and a participant in the Plan. After he was injured in an automobile accident, he sought $13,643.63 from the Plan for medical expenses. The Plan paid Mestemacher's medical expenses in that amount, subject to a "Reduction, Reimbursement and Subrogation" provision contained in the Plan's documents. That provision gave the Plan "the right to recover or subrogate 100% of the Benefits paid...by the Plan for Covered Persons to the extent of...[a]ny judgment, settlement, or payment made or to be made, because of an accident, including but not limited to insurance." The documents further specified that "attorneys fees and court costs are the responsibility of the participant, not the Plan."

Mestemacher retained the law firm on a one-third contingent fee basis to seek recovery from the tortfeasor responsible for the automobile accident. After negotiating a $65,000 settlement, the law firm received the settlement payment on Mestemacher's behalf and placed the funds in a trust account at Bank of America in the law firm's name.

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[1] See 29 U.S.C. § 1002(1).

B. The Instant Litigation

This action arises out of the Plan's efforts to obtain reimbursement for the funds advanced to Mestemacher. The Plan filed suit in district court against the law firm, Mestemacher, and Bank of America before Mestemacher's settlement funds were ever disbursed to him from the law firm's trust account at Bank of America.[2]

In its efforts to recover the funds that it had advanced to Mestemacher for medical expenses, the Plan sought (1) the imposition of a constructive trust over $13,643.63 of the funds being held for Mestemacher in the law firm's trust account, (2) a declaration that the Plan is entitled to ownership of that amount out of the settlement funds that remained in the trust account, (3) an order directing the law firm and Bank of America to execute any instruments necessary to transfer legal title of the "converted property" to the Plan, and (4) a temporary restraining order and a preliminary injunction prohibiting the law firm from disbursing the share of the settlement funds claimed by the Plan.

In an agreed order, the law firm consented to hold $18,500.00 of the settlement proceeds in its trust account, an amount more than sufficient to satisfy the Plan's reimbursement demand. The law firm nevertheless maintained that it was entitled to one-third of the proceeds of the settlement ($21,666.66) plus costs ($302.24), by virtue of its contingent fee agreement with Mestemacher. The law

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[2] Bank of America was voluntarily dismissed from this suit after settling with all parties.

firm and Mestemacher each filed a motion to dismiss for lack of subject matter jurisdiction, contending that § 502(a)(3) of ERISA does not provide a cause of action against an entity like the law firm, which is neither a plan fiduciary nor a signatory to the plan, and does not authorize the Plan's claim for a constructive trust over funds not in the possession of its participant, Mestemacher.

Agreeing with the Plan's assertion that it was seeking "equitable relief" within the contemplation of § 502(a)(3), the district court accepted subject matter jurisdiction over the Plan's action and denied Mestemacher's and the law firm's motions to dismiss. Agreeing further that the terms contained in the Plan's documents provide a right of reimbursement, the district court granted summary judgment in favor of the Plan and ordered the law firm to transfer to the Plan the sum of $13,643.63 from the settlement proceeds being held in its trust account. This judgment further ordered that nothing be deducted from the Plan's funds for attorneys' fees and costs.

Citing our opinion in Sunbeam-Oster Company, Inc. Group Benefits Plan for Salaried and Non-bargaining Hourly Employees v. Whitehurst,[3] the district court observed that the Plan contained "clear and unambiguous reimbursement provisions, including a provision allowing the Plan reimbursement from third party beneficiaries such as settlement proceeds."[4] As for whether the Plan had stated a

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[3] 102 F.3d 1368 (5th Cir. 1996).

[4] All parties agree that the Plan's language unambiguously provides for a right of reimbursement and subrogation. As neither party seeks a construction of the Plan's terms, we need not engage in application of the deference principles articulated by the Supreme Court in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989).

claim under § 502(a)(3), the court noted that the Plan did not seek to impose in personam liability on any of the defendants, but merely sought the in rem imposition of a constructive trust over funds in the trust account. Thus, the district court concluded, the Plan's claim was for "appropriate equitable relief" under § 502(a)(3) and fell comfortably within that jurisdictional grant. Finally, the court refused to apply either the Texas or the federal version of the common fund doctrine to block the Plan's recovery, noting that "the Plan expressly provides that attorney's fees and court costs are the responsibility of Mestemacher and not the Plan." Final judgment was entered in the Plan's favor, and Mestemacher and the law firm timely filed a notice of appeal.

II. ANALYSIS

A. Standard of Review

We review de novo both a grant of a motion to dismiss and a grant of a motion for summary judgment.[5] In our de novo review of a district court's ruling on a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), we apply the same standard as does the district court: "[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which

[5] See St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

would entitle her to relief."[6]

B. Subject Matter Jurisdiction

To determine whether the district court properly exercised subject matter jurisdiction over the instant action, we first must decide whether § 502(a)(3) authorizes the Plan's suit for a constructive trust over the funds held in the law firm's trust account.[7] The law firm and Mestemacher assert two bases for holding that § 502(a)(3) does not authorize the Plan's suit. They first contend that, because the law firm was not a signatory to the Plan, it is not a fiduciary; thus the Plan cannot maintain an action for equitable relief against the law firm under § 502(a)(3). They contend secondly that the Plan's action for a constructive trust is not one "typically available in equity" and thus falls outside § 502(a)(3)'s jurisdictional grant.

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[6] Benton v. United States, 960 F.2d 19, 21 (5th Cir. 1992); see also St. Paul Mercury Ins. Co., 224 F.3d at 440 n.8 ("[T]he central issue [in reviewing a motion to dismiss] is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.").

[7] See Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 442 (5th Cir. 2002)("ERISA grants the federal courts "exclusive jurisdiction of civil actions under this title brought by . . . [a] fiduciary."). The parties agree that the Plan is governed by ERISA and that the Plan is a "fiduciary" under ERISA.

1. The "Universe of Possible Defendants" under § 502(a)(3).

Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."[8] The law firm and Mestemacher contend that this authorization is contingent on the existence of a professional or contractual relationship between the Plan and the particular defendant that is subject to suit. In other words, according to them, an entity must owe a duty to an ERISA plan before it can properly be named as a defendant in a § 502(a)(3) suit for equitable relief. Because it is not a signatory of the Plan, insists the law firm, it owes no fiduciary duty to the Plan, and thus no cause of action can be maintained against it under § 502(a)(3).[9] We disagree.

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[8] 29 U.S.C. § 1132(a)(3).

[9] For purposes of this case, a person is a plan fiduciary to the extent that he exercises discretionary authority or control over the management or administration of the plan or its assets, or renders investment advice to the plan for compensation. See 29 U.S.C. § 1002(21)(A). The parties agree that the law firm is not a plan fiduciary.

Although neither we nor the Supreme Court has squarely addressed the question whether a plan participant's or beneficiary's attorney who possesses disputed settlement funds on his client's behalf can be subject to suit under § 502(a)(3), the Supreme Court has ruled that § 502(a)(3) liability is not dependent on an entity's status as a plan fiduciary. In Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.,[10] the Court squarely held that § 502(a)(3) authorizes suit against a non-fiduciary "party in interest" to a transaction prohibited under § 406(a).[11] In so holding, the Court rejected the Seventh Circuit's holding that no cause of action exists under § 502(a)(3) absent a substantive provision of ERISA expressly imposing a duty on the party being sued. The Court observed that § 502(a)(3) "admits of no limit (aside from the 'appropriate equitable relief' caveat...) on the universe of possible defendants."[12] Indeed, the Court noted that, in contrast to other provisions of ERISA which expressly delineate the entities subject to suit,[13] "§ 502(a)(3) makes no mention at

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[10] 530 U.S. 238 (2000).

[11] See id. at 241. ERISA both imposes a general duty of loyalty on plan fiduciaries, § 406(a); 29 U.S.C. § 1104, and,"categorically bar[s] certain transactions deemed 'likely to injure the pension plan.'" § 406(a)(1); 29 U.S.C. § 1106.

[12] Id. at 244-246.

[13] For example, the following ERISA provisions explicitly delineate the entities subject to suit: (1) "§ 409(a), 29 U.S.C. § 1109(a)("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable");" and (2) "§502(l), 20 U.S.C. § 1132(l)(authorizing imposition of civil penalties only against a 'fiduciary' who violates part 4 of Title I or 'any other person' who knowingly participates in such a violation)." Id. at 246-47.

all of which parties may be proper defendants."[14] This is because "502(a)(3) itself imposes certain duties, and therefore...liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued."[15]

The litigation in Harris Trust arose out of a soured business deal between an ERISA plan and a "party in interest." National Investment Services of America ("NISA") had been hired by the plan's administrator to act as an investment manager for the plan.[16] Because it had "discretionary control" over plan assets, NISA qualified as a plan fiduciary.[17] Salomon Smith Barney, Inc. ("Salomon") furnished the plan with broker-dealer services at the direction of the fiduciaries, thus qualifying under § 3(14) as a "party in interest."[18] During the relevant time, Salomon sold to the plan, through NISA, interests in several motel properties that later turned out to be worthless.[19]

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[14] Id. at 246.

[15] Id. at 245.

[16] See id. at 242-43.

[17] Id. at 243.

[18] See id. at 242.

[19] Id. at 243.

On learning of the nature of this transaction, the plan's administrator and its trustee filed suit against Salomon under § 502(a)(3), claiming, inter alia, "that NISA, as plan fiduciary, had caused the plan to engage in a per se prohibited transaction under § 406(a) in purchasing the motel interests from Salomon."[20] Salomon countered that § 502(a)(3) authorizes suit "only against the party expressly constrained by 406(a)," namely, the fiduciary who caused the party to enter into the prohibited transaction, and not the "counterparty to the transaction."[21] The Seventh Circuit agreed with Salomon, but the Supreme Court reversed for the reasons stated above.[22] Therefore, even though, in the instant litigation, the law firm is not a "party in interest," as that term is defined by ERISA,[23] the Supreme Court's reasoning in Harris Trust influences us to conclude today that § 502(a)(3) authorizes a cause of action against a non-fiduciary, non-"party in interest" attorney-at-law when he holds disputed settlement funds on behalf of a plan-participant client who is a traditional ERISA party. As Harris Trust makes clear, an entity need not be acting under a duty imposed by one of ERISA's substantive provisions to be subject to liability under § 502(a)(3).

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[20] Id.

[21] Id.

[22] See id. at 244-45.

[23] The term "'party in interest'...encompasses those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." Harris Trust, 530 U.S. at 242. Finding nothing in the record that would suggest that the law firm is an entity likely to be favored by the plan's fiduciaries, we will assume that the law firm is not a "party in interest."

To this end, we note that the law firm's reliance on the Seventh Circuit's opinion in Health Cost Controls of Illinois, Inc. v. Washington[24] in support of the law firm's contrary position —— that an entity must be a plan fiduciary before it can be properly named as a defendant in a § 502(a)(3) action —— is badly misplaced. The question before the Health Cost court was not, as here, which entities can be subject to suit under § 502(a)(3), but rather which entities are entitled to bring suit under § 502(a)(3). In Health Cost, the Seventh Circuit addressed, inter alia, whether the assignee of an ERISA plan's reimbursement claims qualified as an ERISA fiduciary and thus as a proper plaintiff in a suit for a constructive trust under § 502(a)(3). Although the court noted that a lawyer hired by an ERISA plan to bring suit on the plan's behalf is not an ERISA fiduciary, and thus not a proper plaintiff to a § 502(a)(3) action, it held that, because an assignee of a plan's reimbursement claims exercises greater discretion over the plan's assets than does the plan's lawyer, the assignee qualified as a fiduciary and thus as a proper plaintiff under § 502(a)(3).[25]

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[24] 187 F.3d 703 (7th Cir. 1999).

[25] See id. at 709.

Without a doubt, the text of § 502(a)(3) places limits on the proper plaintiffs to a suit for equitable relief: As the language of that provision expressly states, a civil action for equitable relief may be brought only by a "participant, beneficiary, or fiduciary" of an ERISA plan.[26] Congress did not see fit, however, to include a similar limitation on the set of proper defendants to a § 502(a)(3) action, and we decline the law firm's invitation to impose such limits judicially today.[27]

In sum, the law firm's status as a non-fiduciary would have some relevance to this case if the Plan were seeking to saddle the lawyers with personal liability for the breach of a fiduciary duty. As it stands, however, the only action that

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[26] See Harris Trust, 530 U.S. at 248 ("502(a) itself demonstrates Congress' care in delineating the universe of plaintiffs who may bring certain civil actions.").

[27] The other cases cited by the law firm in support of its proposition that it must be a plan fiduciary to be a proper defendant under § 502(a)(3) are equally inapposite. The issue in each of these cases was whether the plan could properly maintain an action against the defendant-attorney for either breach of contract or breach of fiduciary duty — not for equitable relief under § 502(a)(3). See Southern Council of Indus. Workers v. Ford, 83 F.3d 966, 969 (8th Cir. 1996)(subject matter jurisdiction exists over plan's claim for breach of fiduciary duty against beneficiary's attorney who signed the plan's subrogation agreement); Witt v. Allstate Ins. Co., 50 F.3d 536, 538 (8th Cir. 1995)(beneficiary's insurer is not a fiduciary subject to liability to the plan for breach of fiduciary duty); Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner, 50 F.3d 719, 721 (9th Cir. 1994)(beneficiary's attorney is not liable for breach of fiduciary for failing to reimburse plan prior to distributing settlement funds to the beneficiary); Chapman v. Klemick, 3 F.3d 1508, 1508-09 (11th Cir. 1993)(beneficiary's attorney is not a fiduciary subject to liability to the plan for breach of fiduciary duty).

the Plan asserts is one for equitable in rem relief under § 502(a)(3). As liability under that provision does not depend on whether a substantive provision of ERISA imposes a duty on the particular defendant subject to suit, we hold that the law firm, as counsel for the plan participant and stake holder of specifically identifiable settlement funds in a trust account —— on that beneficiary's behalf —— fits comfortably within the "universe of possible defendants" subject to suit under that provision.

2. "Appropriate Equitable Relief" under § 502(a)(3)

The law firm and Mestemacher contend next that, despite styling its action as one for a "constructive trust" over the funds contained in the law firm's trust account, the Plan actually seeks to impose personal liability on the defendants to enforce Mestemacher's contractual reimbursement obligation to the Plan for the amount he received in benefits. Thus, they argue, the Plan's suit is essentially legal in nature —— as distinguished from equitable —— and falls outside the scope of "appropriate equitable relief" permitted by § 502(a)(3). The Plan responds —— correctly, we conclude —— that because it seeks to recover specifically identifiable funds that are in the constructive possession and the legal control of the participant but belong in good conscience to the Plan, its action for a constructive trust in no way seeks to impose personal liability on either defendant. Instead, the Plan continues, it seeks relief that indeed is equitable in nature and thus authorized by § 502(a)(3).

In Mertens v. Hewitt Associates, the Supreme Court interpreted "appropriate equitable relief" under § 502(a)(3) to include only "those categories of relief that were typically

available in equity."[28] Subsequently, the Court, in Great-West Life & Annuity Insurance Co. v. Knudson, elaborated on the distinction between "legal" and "equitable" relief, stating that "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[29]

On the other hand, reasoned the Court, if "'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains," "[the plaintiff's] claim is only that of a general creditor, and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'"[30] In such an instance, the plaintiff is seeking a legal remedy —— the imposition of personal liability on the defendant to pay a sum of money to which

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[28] 508 U.S. 248, 256 (1993).

[29] 534 U.S. 204, 213 (2002)(citations omitted). In Knudson, the plan administrator sought to recover benefits paid to a beneficiary following the latter's receipt of settlement funds from a third-party tortfeasor. See Knudson, 534 U.S. at 208. The funds, however, had been placed in a Special Needs Trust for the beneficiary to provide for her medical care pursuant to California law. See id. at 207-08. The Supreme Court rejected the plan administrator's argument that it sought equitable relief under § 502(a)(3), stating that "the funds to which [the plan] claims an entitlement under the Plan's reimbursement provision . . . are not in the [beneficiary's] possession." Id. at 214. As the plan essentially sought "the imposition of personal liability [upon the beneficiary] for the benefits" it had conferred, the Court held that its claim was legal, rather than equitable, in nature and thus fell outside the scope of relief authorized by § 502(a)(3). Id.

[30] Id. at 213-14 (citing RESTATEMENT (FIRST) OF RESTITUTION § 215 (1937)).

the plaintiff is owed —— so his claim falls outside § 502(a)(3)'s jurisdictional grant.[31]

[31] See id. at 210 (citing Mertens, 508 U.S. at 256.)

Recently, in Bauhaus USA, Inc. v. Copeland,[32] we interpreted Mertens and Knudson in the context of a plan administrator's suit to recover benefits previously paid to a plan beneficiary, after settlement funds from a third party tortfeasor were received on behalf of the beneficiary. The administrator of the plan sought the imposition of a constructive trust over the portion of the funds that had been placed in the registry of the Mississippi Chancery Court, pursuant to the terms of a tort settlement agreement, to satisfy any liens against the funds.[33] Focusing on the language in Knudson regarding the beneficiary's possession of the disputed funds, the panel majority in Bauhaus found the facts of the case before it legally indistinguishable from those considered by the Supreme Court in Knudson.[34] The court observed that the disputed funds in Knudson were outside the "possession and control" of the beneficiary, having been placed in a Special Needs Trust to cover the beneficiary's medical expenses.[35] Reasoning that funds placed in the court registry were just as much beyond the "possession and control" of the beneficiary as those placed in a Special Needs Trust, the panel majority held that the plan's suit did not lie in equity and was therefore unauthorized by § 502(a)(3).[36] Although the facts of Knudson and Bauhaus resemble those in Mestemacher's case in several respects, those cases are significantly

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[32] 292 F.3d 439 (5th Cir. 2002).

[33] See id. at 441.

[34] See id. at 445.

[35] See id.

[36] See id.

distinguishable from Mestemacher's. To verify this conclusion, one need only compare the facts of these three cases by answering the relevant three-part inquiry: Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary? In both Knudson and Bauhaus, as in the instant case, the benefit plans sought to recover funds from a specifically identifiable corpus of money that they had paid out previously as benefits. Likewise, in each case, the plan's terms contained an express, unambiguous reimbursement provision which made the disputed funds "belong in good conscience" to the plan. It is, however, the third element of the inquiry —— the defendant-beneficiary's "possession and control" over the disputed funds —— that distinguishes Knudson and Bauhaus from the case before us today.

In Knudson and Bauhaus, the beneficiary had neither actual nor constructive possession or control over the funds. In Knudson, the funds had been placed in a Special Needs Trust, as mandated by California law, to provide for the beneficiary's medical care, and the trustee was totally independent of the plan beneficiary. Similarly, in Bauhaus, the funds had been deposited in the state court's registry in anticipation of an interpleader action to determine their ownership. Obviously, that court was totally independent of the plan beneficiary. Here, in stark contrast, the funds that the Plan is seeking to recover belong to the participant and are simply being held in a bank account in the name of the participant's attorneys, who are indisputably his agent. Unlike the beneficiaries in Knudson and Bauhaus, the Plan's participant, Mestemacher, has ultimate control over, and thus constructive possession of, the disputed funds. The law firm

and Mestemacher concede that the law firm is merely holding the funds in its trust account on Mestemacher's behalf —— as Mestemacher's agent —— and is legally obligated to disburse the funds to Mestemacher the moment he directs their release. This crucial distinction is more than sufficient to warrant a finding that the Plan's action is indeed "equitable" in nature.

The Seventh Circuit's recent opinion in Administrative Committee of the Wal-Mart Stores, Inc. Associated Health and Welfare Plan v. Varco offers further support for our determination that the Plan's action for a constructive trust lies in equity.[37] In Varco, the ERISA plan sought to enforce the provisions of a subrogation clause against a participant through imposition of a constructive trust over settlement funds from a third party tortfeasor.[38] The participant's attorney had accepted delivery of the funds from the tortfeasor on the participant's behalf prior to the plan's filing suit and, after taking out an amount sufficient to cover his fees, the lawyer had placed the remaining funds in a reserve account in the participant's name.[39] Noting that (1) the participant had "control" over the disputed funds, (2) the funds were "identifiable, and [had] not been dissipated," and (3) the funds, "in good conscience," belonged to the plan, the Seventh Circuit held that the plan's action for a constructive trust was equitable in nature and therefore authorized by § 502(a)(3).[40]

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[37] 338 F.3d 680 (7th Cir. 2003).

[38] See id. at 683-84.

[39] See id. at 684.

[40] See id. at 687-88.

In making the same determination today, we remain unpersuaded by the contention voiced by the law firm during oral argument to the effect that Mestemacher lacks "possession and control" over the one-third share of the $18,500 contained in the trust account to which the law firm asserts ownership by virtue of its contingent fee agreement with Mestemacher. This assertion ignores Mestemacher's pre-existing contractual reimbursement obligation to the Plan, which requires him to reimburse the Plan the full amount of the benefits that he had received from the Plan and to do so out of any third-party recovery, without deduction for attorney's fees and costs. This pre-existing reimbursement obligation to the Plan precluded Mestemacher from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the $13,643.63 that rightfully belonged to the Plan. In essence, Mestemacher could not create a greater right in the funds by virtue of entering the contingent fee arrangement with the law firm than Mestemacher had himself.

In addition, Mestemacher's contingent fee agreement does not restrict his obligation to compensate the law firm solely to the proceeds of his recovery. Rather, that agreement creates an in personam obligation, requiring Mestemacher to pay counsel an amount equivalent to one-third of his recovery. Mestemacher is personally responsible to the law firm for its attorneys' fees in an amount equal to one-third of his recovery. The fact that he may have to satisfy some part or even all of this personal obligation out of his own pocket in no way diminishes his pre-existing reimbursement obligation to the Plan vis-à-vis the funds recovered from his tortfeasor. We are satisfied that neither Mestemacher's contingency fee agreement with the law firm

nor the location of the settlement funds in the trust account affects his legal "possession and control" over the disputed $13,643.63. Our conclusion in this regard is consistent with Judge Posner's opinion for the Seventh Circuit in Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan v. Wells,[41] in which that court held, on substantially similar facts, that a plan administrator's § 502(a)(3) suit for a constructive trust over settlement funds presumed to be held in escrow by the participant's attorney "nestle[d] comfortably" within "ERISA's concept of equity."[42]

Having closely examined the substance of the relief sought in the case before us, we are convinced that, in its efforts to recoup the amount paid to Mestemacher in benefits, the Plan does not seek to impose personal liability on either Mestemacher or his counsel. Thus, we hold the Plan's requested relief —— the imposition of a constructive trust over specifically identifiable settlement funds held in the trust account of the law firm as agent for Mestemacher —— to be equitable in nature. Accordingly, we further hold that § 502(a)(3) authorizes the Plan's claim for relief, and we affirm the district court's exercise of subject matter jurisdiction over this action.[43]

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[41] 213 F.3d 398, 401 (7th Cir. 2000).

[42] Id.

[43] We recognize that our holding today is at variance with the Ninth Circuit's recent opinion in Westaff (USA), Inc. v. Arce. See 298 F.3d 1164 (9th Cir. 2002). In Westaff, the Ninth Circuit held that a plan administrator's suit to recoup benefits paid to a beneficiary upon the beneficiary's receipt of settlement funds from a third party tortfeasor was essentially legal in nature, even though the beneficiary had placed the funds in an escrow account in the beneficiary's name pending a determination of to whom the money was owed. See id. at 1167.

Acknowledging that the disputed funds held in escrow were "specifically identifiable," the Ninth Circuit nevertheless held that the funds were "a legitimate personal injury settlement to which the beneficiary is entitled" and that the administrator's action was essentially "one for money damages" falling outside the jurisdictional grant of § 502(a)(3). Id. We perceive that decision to depart from the Supreme Court's opinions in Mertens and Knudson, and from our own precedent in Bauhaus, so we decline to follow the Ninth Circuit's more restrictive view of the scope of "appropriate equitable relief" under § 502(a)(3).

C. Actual Fraud and Unjust Enrichment

We turn next to the question whether a showing of either actual fraud or unjust enrichment, or both, on the part of Mestemacher and the law firm is required before a constructive trust can be imposed on the disputed funds. Noting correctly that ERISA does not specify the elements of a constructive trust in a § 502(a)(3) action,[44] the law firm and Mestemacher maintain that this lacuna in the statutory text should be filled by Texas law. Under that State's law, a plaintiff seeking a constructive trust must establish, inter alia, (1) the breach of a fiduciary relationship or, alternatively, actual fraud, and (2) unjust enrichment of the wrongdoer.[45]

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[44] See 29 U.S.C. § 1132(a)(2).

[45] See, e.g., Haber Oil Co. v. Swinehart, 12 F.3d 426, 437 (5th Cir. 1994). We recognize in passing that our precedent interpreting Texas law as it relates to constructive trusts has not been altogether consistent. In some cases, we have interpreted Texas law as requiring a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust. See id. at 437 (the elements of a constructive trust under Texas law include, inter alia, "breach of a fiduciary relationship, or in the alternative, actual fraud....")(citing In re Monnig's Dept. Stores, Inc. v. Azad Oriental Rugs, Inc., 929 F.2d 197, 201 (5th Cir. 1991)). More recently, we held that it was sufficient under Texas law for a plaintiff to show merely constructive fraud, as opposed to actual fraud or wrongdoing. See Burkhart Grob Luft und Raumfakrt GmbH & Co. v. E-Systems, Inc., 257 F.3d 461, 469 (5th Cir. 2001)(the elements of a constructive trust under Texas law include a showing of either actual or constructive fraud)(citing Haber Oil Co., Inc. v. Swinehart, 12 F.3d 426, 437 (5th Cir. 1994)). If indeed constructive fraud is all that is required under Texas law, then the district court clearly did not err in not making a finding of fraud, for the requirement of "constructive fraud" is "merely an expression of the idea that a constructive trust may arise in the absence of fraud." SCOTT ON TRUSTS § 462 (4th ed. 2001).

Nevertheless, because some confusion exists as to this issue, and because the issue was not briefed by the parties, we will assume arguendo for purposes of the instant analysis that Texas law requires a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust.

In recognition of ERISA's overarching aim of national uniformity, we have consistently held that any hiatus in ERISA's text must be filled by application of federal common law rather than the law of any particular state.[46] Accordingly, Texas law is not directly applicable to the Plan's claim, and the Plan will not be required to establish actual fraud and unjust enrichment —— unless, that is, some basis exists for concluding that these elements are required under a federal common law standard for the imposition of a constructive trust.

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[46] See Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303 (5th Cir. 1992)("Both the legislative history and the case law pursuant to ERISA validate our application of federal common law to ERISA."); see also Rodrigue v. Western and Southern Life Ins. Co., 948 F.2d 969, 971 (5th Cir. 1991)("Congress intended that federal courts should create federal common law when adjudicating disputes regarding ERISA.").

Although the law firm and Mestemacher argue alternatively that we should incorporate the Texas law elements of actual fraud and unjust enrichment into the federal common law rule, federal common law —— like gaps in ERISA's statutory provisions —— cannot be defined solely by reference to the law of but a single state. This is especially true when adherence to the strictures of Texas law would require the Plan to establish actual fraud on the part of either Mestemacher or the law firm, an element that has never been required by the Supreme Court or this Circuit. Indeed, as discussed in the preceding section, Knudson requires a § 502(a)(3) plaintiff seeking a constructive trust to show only the existence of "money or property identified as belonging in good conscience to the plaintiff [that can] clearly be traced to particular funds or property in the defendant's possession," and makes no mention of the necessity of showing actual fraud or wrongdoing on the part of the defendant.[47] Neither does Bauhaus, which contains our most recent discussion of the circumstances in which a constructive trust may be imposed under § 502(a)(3), suggest that a showing of actual fraud or wrongdoing is required.

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[47] Knudson, 534 U.S. at 213.

Further, as did the Knudson Court in its efforts to define the contours of "appropriate equitable relief" under § 502(a)(3), we look to "standard current works, such as Dobbs, Palmer, Corbin, and the Restatements" in ascertaining the federal common law rule to be applied.[48] Of those works, two that have squarely considered whether a showing of fraud or wrongdoing is required for imposition of a constructive trust have concluded that such a trust may properly be imposed in the absence of fraud.[49] Based on these expressions, as well as the absence of any indication in our precedent or that of the Supreme Court to the effect that federal common law requires that actual fraud be established before a constructive trust can be imposed under § 502(a)(3),[50] we hold today that federal common law does not

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[48] Id. at 716.

[49] SCOTT ON TRUSTS § 462 (4th ed. 2001)("[T]here are numerous situations in which a constructive trust may be imposed in the absence of fraud."); 1 DOBBS LAW OF REMEDIES § 4.3(2)(2d ed. 1993)("Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries or in cases of fraud . . . but this is a misconception.").

[50] In considering whether federal common law permits imposition of a constructive trust in the absence of a showing of actual fraud or other wrongdoing, the Seventh Circuit has also answered the question in the negative. See Health Cost Controls, 187 F.3d at 711. Writing for the panel in Health Cost, Judge Posner noted that although the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, FMC Medical Plan v. Owens, 122 F.3d 1258, 1261 (9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity. Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, 1 Dobbs, supra, § 4.3(2), p. 597, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp. Id.

require a plaintiff in a §502(a)(3) action to show that he was the victim of actual fraud or wrongdoing as a prerequisite to obtaining a constructive trust.[51]

As for the additional requirement of Texas law that the defendant must have been unjustly enriched at the expense of the plaintiff, it is axiomatic that a party who retains funds "belonging in good conscience to another" is unjustly enriched at that other party's expense. None disputes that the Plan's terms unambiguously state a right to recover benefits that it has previously paid, up to the full extent of any settlement proceeds obtained by the participant or beneficiary. Thus, the disputed funds "belong in good conscience" to the Plan, and the law firm's and Mestemacher's continued retention of these funds would unjustly enrich them at the Plan's expense. Accordingly, even if we assume arguendo that unjust enrichment is a prerequisite, the Plan has produced sufficient evidence that the defendants would be unjustly enriched, entitling the Plan to have a constructive trust imposed on the disputed settlement funds.

D. Common Fund Doctrine

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[51] As today we hold that actual fraud is not an element required in a § 502(a)(3) action for a constructive trust, we do not reach the question whether the Plan has demonstrated actual fraud on the part of Mestemacher and the law firm. We note, however, that at least one other circuit has observed, on nearly identical facts, that the refusal of a participant's lawyer to turn over settlement proceeds that rightfully belonged to the plan constituted wrongdoing on the part of the lawyer. See Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan v. Wells, 213 F.3d 398, 401 (7th Cir. 2000)(lawyer's refusal to hand over settlement check to which plan claimed entitlement by virtue of its unambiguous reimbursement provision was "clearly wrongful").

Finally, we consider whether the Plan's claim is subject to either the Texas or the federal "common fund" doctrine. There is no substantive difference between the Texas and federal versions of this doctrine; in essence, both provide that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[52] "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."[53] In the instant case, the district court found this doctrine inapplicable to the Plan's claim for benefits because the language of the Plan expressly provided —— long before Mestemacher was injured and long before he retained the law firm on a contingent fee basis —— that "[a]ttorney's fees and court costs are the responsibility of the participant, not the Plan." We agree.

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[52] Boeing Co. v. Van Gemert, 444 U.S. 47, 478 (1980); compare Lancer Corp. v. Murillo, 909 S.W.2d 122 (Tex. App. — San Antonio 1995, no writ)("Under the [Texas] common fund doctrine, the court may allow reasonable attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefiting other parties as well as himself.")(cites omitted).

[53] Boeing, 444 U.S. at 478; compare Lancer Corp., 909 S.W.2d at 126 ("The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses.")(citing Trustees v. Greenough, 105 U.S. 527, 532-37 (1881); Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 799-801 (Tex. 1974)).

Although we have yet to address whether equitable fee sharing is warranted under the common fund doctrine when the Plan language expressly provides to the contrary, we held in Walker v. Wal-Mart Stores, Inc. that, when a plan's terms give it the right to recover benefits "to the extent of any and all" settlement payments, but fail to specify who bears the responsibility for fees and costs, the plan is nevertheless entitled to full recovery of the amount of the benefits paid without offset for fees and costs.[54] Here, the Plan's terms not only give it the right to recover benefits "to the extent of any and all" settlement payments, but explicitly state that the participant must bear the fees and costs associated with his tort action. Our holding in Walker thus supports our determination here that neither the federal nor Texas common fund doctrine may be invoked to prevent or reduce the Plan's recovery of the funds that it advanced to Mestemacher, up to the full amount of his recovery from the tortfeasor.

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[54] 159 F.3d 938, 940 (5th Cir. 1998). Interpreting the plan's "'any and all' language," the Walker panel held that such language "plainly means the first dollar of recovery (any) and 100% recovery (all) of the funds received by the plaintiff in the settlement, up to the full amount of the benefits paid." Id. The panel further noted that the fact that the plan did not "specifically mention attorneys' fees or set out detailed distribution procedures d[id] not constitute silence or ambiguity on behalf of the plan," reasoning that ERISA plans should not be labeled "silent or unambiguous" simply for lack of "technical precision." Id.

The Seventh Circuit's Varco opinion further supports this conclusion.[55] The Varco court refused to apply either the Illinois or federal common fund doctrine to defeat an ERISA plan's express provision that fees and costs were the sole responsibility of the participant.[56] Considering the Illinois doctrine first, the court held that, because application of that doctrine would contradict the express terms of the Plan, it was preempted by § 514 of ERISA.[57] Turning next to the federal common fund doctrine, the Varco court declined to offset the plan's recovery on that basis as well, noting that application of "federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provided for the appropriate distribution of attorney's fees."[58] Thus, reasoned the Seventh Circuit, the federal common fund doctrine should only be applied to offset an ERISA plan's recovery in the absence of controlling plan language that specifies the manner in which the costs of the underlying litigation are to be distributed.[59]

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[55] 338 F.3d 680 (7th Cir. 2003)

[56] See id. at 692-93.

[57] See id. at 690. In addition to complete preemption under § 502(2), ERISA § 514 provides for conflict preemption when a state statute "directly conflicts with ERISA's requirements that the plans be administered, and benefits be paid in accordance with plan documents." Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 150 (2001); 29 U.S.C. 1144(a).

[58] Varco, 338 F.3d at 692.

[59] Id. (citing McIntosh v. Pacific Holding Co., 120 F.3d 911, 917 (8th Cir. 1997); Waller v. Hormel Foods Corp., 120 F.3d 138, 141 (8th Cir. 1997)).

We agree with the Seventh Circuit's determination in Varco that the state and federal common fund doctrines are inapplicable when, as here, the controlling plan language clearly and unambiguously expresses that fees and cost are the sole responsibility of the participant. Accordingly, we hold that the district court correctly refused to apply either the Texas or federal common fund doctrines to allow a deduction from the Plan's recovery of a pro rata share of Mestemacher's attorney's fees and costs.

III. CONCLUSION

We affirm the district court's exercise of subject matter jurisdiction based on ERISA § 502(a)(3) over the Plan's action for a constructive trust because it is equitable in nature. Further, because federal common law does not require a showing of actual fraud or wrongdoing as an element of imposing a constructive trust, we affirm the district court's grant of the Plan's requested relief, despite an absence of such a showing. Finally, we affirm the district court's holding that neither the federal nor Texas common fund doctrine trumps the Plan's express language specifying that all fees and costs associated with the underlying tort litigation are to be born by the participant. Accordingly, the district court's decision is, in all respects,
AFFIRMED.

Appendix B

BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN, Plaintiff, VS. FERRER, POIROT, AND WANSBROUGH, P.C., ET AL., Defendants.

CIVIL ACTION NO. 3:02-CV-1982-G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2003 U.S. Dist. LEXIS 1643

February 4, 2003, Decided
February 4, 2003, Filed
[February 5, 2003, Entered]

Before the court are the following motions: (1) the motion of the plaintiff Bombardier Aerospace Employee Welfare Benefits Plan (the "Plan") for summary judgment; (2) the cross motion of the defendants Steven Mestemacher ("Mestemacher") and Ferrer, Poirot, and Wansbrough ("Ferrer, Poirot") for summary [*2] judgment; (3) the motion of Ferrer, Poirot to dismiss; (4) the motion of Mestemacher to dismiss; and (5) the motion of Bank of America, N.A. ("Bank of America") for leave to file a first amended answer and complaint for interpleader. For the following reasons, the Plan's motion for summary judgment is granted, and the remaining motions are denied.

I. BACKGROUND

The Plan is a self-funded employee welfare benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1).

Plaintiff's Verified Complaint ("Complaint") P 1. Great-West Life & Annuity Insurance Company ("Great-West") is the administrator of the Plan. Affidavit of Mary Ann Hanneken ("Hanneken Affidavit") P 3, *located in* Appendix to Plaintiff's Response to Defendants Steven Mestemacher and Ferrer, Poirot's Cross-Motion for Summary Judgment ("Appendix to Plaintiff's Response to Cross Motion for Summary Judgment"), at 12-16. The Plan was established by Bombardier Aerospace to provide managed care services for its employees and their dependents. Complaint PP 2, 4. As an employee of Bombardier Aerospace, Mestemacher was a participant and beneficiary of the Plan within the meaning of ERISA. *Id.*

Ferrer, Poirot is a Texas general partnership. *Id.* P 5.

Bank of America is a banking association with an office in Dallas, Texas. *Id.* P 6.

On or about January 31, 2002, Mestemacher was injured in an automobile accident. *Id.* P 10. In conjunction with that accident, Mestemacher received $ 13,643.63 in benefits under the Plan for medical expenses incurred in treating his injuries. *Id.* P 13. This payment was made by Great-West. Hanneken Affidavit P 4.

At the time of Mestemacher's accident, The Plan contained following pertinent provisions:

> Refund to Us for Overpayment of benefits
>
> If You or Your dependent recover money for medical, Hospital, dental or vision expenses incurred due to an Illness or Injury for which a Benefit has been paid under this Plan, We will have the right to a

refund from You or Your dependent. The amount refunded to Us will be the lesser of:

1. the amount You or Your dependent recover;

2. the amount of Benefits We have paid.

You or Your dependent (or a parent or legal guardian, if required) will help Us do whatever else may be reasonably needed to obtain this refund.

Right to Reduction, Reimbursement and Subrogation

The Plan has a right to 1) reduce or deny Benefits otherwise payable by the Plan and 2) recover or subrogate 100% of the Benefits paid or to be paid by the Plan for Covered Persons to the extent of any and all of the following payments:

- Any judgment, settlement or payment made or to be made, because of an accident, including but not limited to other insurance.

- Any auto or recreational vehicle insurance coverage or benefits including, but not limited to, uninsured / underinsured motorist coverage.

- Business and homeowners medical and/or liability insurance coverage or payments.

Attorney fees. Cooperation Required

The Plan requires Covered Persons or their representatives to cooperate in order to guarantee reimbursement to the Plan from third party benefits.

> Failure to comply with this request will entitle the Plan to withhold Benefits due to Covered Persons under the
> Plan Document. Covered Persons or their representatives may not do anything to hinder reimbursement of overpayment to the Plan after You have accepted benefits.
>
> Attorney fees and court costs are the Responsibility of the participant, not the Plan. Complaint P 12.

In mid-2002, Mestemacher settled all claims against the party causing his injuries for $ 65,000. *Id.* P 14; Defendant, Steven Mestemacher's Rule 12(b)(1), (6) Motion to Dismiss ("Mestemacher Motion to Dismiss") at 1. The law firm of Ferrer, Poirot represents Mestemacher. Defendant, Steven Mestemacher's and Ferrer, Poirot's Supporting Brief to Defendants' Cross Motion for Summary Judgment ("Mestemacher Motion for Summary Judgment") at 2. Pursuant to an order of this court, $ 18,500 of the settlement funds paid on behalf of Mestemacher's personal injury claim are currently held in Ferrer, Poirot's trust account at Bank of America. Complaint P 16; Order dated September 27, 2002. These funds are not to be released without a further order of this court or until the parties agree to release the funds. Order dated September 27, 2002.

The defendants maintain that of the $ 65,000 obtained in the underlying tort claim, 33 1/3%, or $ 21,666.66, is allotted for attorney's fees and $ 302.24 is earmarked for non-medical expenses. Mestemacher Motion for Summary Judgment at 14-15; *see also* Affidavit of John T. Kirtley, III ("Kirtley Affidavit") at 1, *located in* Appendix to Defendants', Steven Mestemacher's and Ferrer, Poirot's

Supporting Brief in Response to Plaintiff's Motion for Summary Judgment and Defendants', Steven Mestemacher's and Ferrer, Poirot's Supporting Brief to Defendants' Cross-Motion for Summary Judgment, at 4-5. Mestemacher and Ferrer, Poirot aver that Bombardier did not "actively participate in the procurement of the settlement." Mestemacher Motion for Summary Judgment at 15. The Plan, on the other hand, maintains that it is entitled to the imposition of a constructive trust without a setoff for Mestemacher's attorneys' fees and expenses. Plaintiff's Response to Defendants Steven Mestemacher and Ferrer, Poirot's Cross-Motion for Summary Judgment ("Plaintiff's Response to Cross Motion for Summary Judgment") at 1. The Plan asserts that it seeks imposition of a constructive trust only on $ 13,643.63 currently held in Ferrer, Poirot's trust account and is not interested in pursuing a claim for personal liability against Mestemacher. *Id.* at 4.

The Plan filed this suit on September 13, 2002 asserting that the Plan has an absolute right to reimbursement because the Plan paid Mestemacher's medical expenses. Complaint P 18. First, the Plan seeks the imposition of a constructive trust on the settlement funds in Ferrer, Poirot's trust account at Bank of America. *Id.* Second, the Plan seeks a declaration of the rights of the parties, specifically that the Plan is entitled to ownership of the Mestemacher settlement funds remaining in that trust account. *Id.* PP 18, 25. Third, the Plan requests an order directing Mestemacher to release the settlement funds to the Plan and Ferrer, Poirot to execute instruments necessary to transfer legal title of those funds to the Plan. *Id.* P 18. Fourth, the Plan moves to obtain equitable and declaratory relief through the issuance of a temporary restraining order and a preliminary injunction to enjoin Ferrer, Poirot from disbursing the Plan's interest in the settlement funds. *Id.* PP 7, 19-22; *id.* at 7. The Plan also

seeks an award of attorneys' fees and costs. *Id.* at 7. Neither the Plan nor Great-West has been reimbursed any part of the $ 13,643.63 which Great-West paid on Mestemacher's behalf. Affidavit of Stephanie Portman P 5, *located in* Appendix to Plaintiff's Response to Cross Motion for Summary Judgment, at 17-18.

Mestemacher and Ferrer, Poirot contend that the Plan's payment of Mestemacher's medical expenses was not conditioned upon Mestemacher's promise to reimburse the Plan. Mestemacher Motion for Summary Judgment at 3. Ferrer, Poirot also maintains that it has no duty under ERISA to hold the money or to pay the money to the Plan. Mestemacher Motion for Summary Judgment at 4-5. Ferrer, Poirot asserts that even if it is assumed *arguendo* that Mestemacher has a duty to reimburse the Plan, that duty cannot be enforced against Ferrer, Poirot. Mestemacher Motion for Summary Judgment at 4-5. Specifically, Ferrer, Poirot argues that "an attorney retained by an ERISA plan beneficiary, who receives settlement funds . . . from a third party tortfeasor, has no duty enforceable under ERISA." Defendant, Ferrer, Poirot's Rule 12(b)(1), (6) Motion to Dismiss at 3.

II. ANALYSIS

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).[13] "The

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[13] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end

substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed.2d 202, 106 S. Ct. 2505 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. See *Celotex Corporation v. Catrell*, 477 U.S. 317, 323, 91 L. Ed.2d 165, 106 S. Ct. 2548 (1986). Once the movant makes this showing, the nonmovants must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id* at 323-24. To carry this burden, the opponents must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corporation*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Instead, they must show that the evidence is sufficient to support a resolution of the factual issue in their favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponents. Id at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)). Summary judgment is properly entered against a party if after adequate time for discovery, it fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

ERISA expressly requires that a summary plan description be "'written in a manner calculated to be understood by the average plan participant,' and need only be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and

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to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

obligations under the plan.'" *Sunbeam-Oster Company, Inc. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst,* 102 F.3d, 1374-75 (5th Cir. 1996) (quoting29 U.S.C. § 1022(a)(1); see also Walker v. Wal-Mart Stores, Inc., 159 F.3d 938, 940 (5th Cir. 1998) (per curiam). The Plan contains clear and unambiguous reimbursement provisions, including a provision allowing the Plan reimbursement from third party benefits such as settlement proceeds. These provisions, combined with the fact that the Plan is not seeking personal liability from Mestemacher and that the settlement funds are in control of Ferrer, Poirot and not in the registry of this court, entitle the Plan to the imposition of a constructive trust. See *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt,* 211 F. Supp.2d 812, 814-15 (N.D. Tex 2002); see also *Administrative Committee of Wal-Mart Stores, Inc. v. Varco,* 2002 U.S. Dist. LEXIS 18933, No. 01 C 8277, 2002 WL 31189717, at *3 (N.D. Ill. Oct. 2, 2002). Furthermore, the Plan expressly provides that attorney's fees and court costs are the responsibility of Mestemacher and not the Plan.

III. CONCLUSION

For the reasons set forth above, the Plan's motion for summary judgment is GRANTED. The remaining motions are DENIED. Ferrer, Poirot shall pay the Plan $ 13,643.63 of the Mestemacher settlement proceeds remaining in its trust account without any setoff for attorney's fees or expenses. Within ten days of this date, counsel for the Plan shall submit a proposed form of judgment in conformity with this memorandum order.

SO ORDERED.

February 4, 2003.

/s/ A. JOE FISH

CHIEF JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10195
[Filed January 13, 2004]

BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN,

Plaintiff - Appellee,

v.

FERRER, POIROT AND WANSBROUGH; ET AL,

Defendants,

FERRER, POIROT AND WANSBROUGH; STEVEN MESTEMACHER,

Defendants - Appellants.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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ON PETITION FOR REHEARING EN BANC
(Opinion 12/17/03, 5 Cir., _____, _____, F.3d _____)

Before JOLLY and WIENER, Circuit Judges and WALTER,* District Judge.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, THE Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ WEINER, J.

United States Circuit Judge

Judges Garwood, Higginbotham and Clement did not participate in the consideration of the petition for rehearing en banc.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

* District Judge for the Western District of Louisiana, sitting by designation.